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VIA ECFS

Marlene Dortch, Secretary
Federal Communications Commission
445 12th St., SW
Washington, DC 20554

Re: *Ex Parte* Presentation: WC Docket No. 07-135

Dear Ms. Dortch:

Northern Valley Communications, LLC ("Northern Valley") and Sancom, Inc. ("Sancom") operate as rural competitive local exchange carriers ("CLEC") that serve business and residential customers in South Dakota. Northern Valley and Sancom have observed with interest the numerous filings in this docket by which the interexchange carriers ("IXCs") seek to justify and excuse their on-going refusal to pay small carriers like Northern Valley and Sancom for the terminating switched access services they perform to complete the IXCs' customers' calls. Northern Valley and Sancom respond today to highlight recent statements made by the chairman of the South Dakota Public Utilities Commission that succinctly address – and refute – the IXCs' claims in this proceeding, and in civil actions across the country, that a LECs' decision to provide local exchange service to conference calling companies or chat-line providers that receive large volumes of traffic initiated by the IXCs' customers is somehow unlawful.

The only unlawful conduct which the Commission should address is the IXCs' theft of access services and their exercise of self-help in continuing to refuse to pay for the services which they receive pursuant to Northern Valley's, Sancom's and other LECs' lawfully filed tariffs. There is no difference between the IXCs' actions here and a person walking into a restaurant, ordering a meal and then refusing to pay for it. The Commission should remind the IXCs – again – that such self-help tactics are impermissible and threaten the ubiquity of the nation's telecommunications network. Such tactics have necessitated numerous collection actions in federal courts across the country. [1] Northern Valley and Sancom respectfully request

[1] *See, e.g.*, Sancom, Inc. v. Qwest Communications Corp., No. 07-4147-KES (D. S.D.); Northern Valley Communications L.L.C. and Sancom, Inc. v. MCI Communications Services, Inc. d/b/a Verizon Business Services, Docket No. 1:07-cv-01016 (consolidated with No. 1:07-cv-04106) (D.S.D.); Sancom, Inc. v. Sprint Communications Company, Docket No. 4:07-cv-04107 (D. S.D.); Northern Valley Communications L.L.C. v. Sprint Communications Company, Docket No. 1:08-cv-01003 (D. S.D.); Sancom, Inc. v. AT&T Corp., Docket No. 4:08-cv-04211 (D. S.D.); Northern Valley Communications L.L.C. v. XO Communications Services, Inc., Docket No. 1:09-cv-01002 (D. S.D.); Northern Valley Communications L.L.C. v. AT&T Corp., Docket No. 1:09-cv-01003

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that the Commission make clear to the IXCs – to the extent that it is not already – that the *Farmers and Merchants* decision[2] is binding precedent. The Commission should also unequivocally state that in accordance with section 405(b)'s 90-day deadline for reconsideration of tariff-based complaints, only the procedural, non-tariff based aspects of the *Farmers and Merchants* decision are the subject of the Commission's grant of partial reconsideration.

Statement by the Chairman of the South Dakota Public Utilities Commission

The Chicago Tribune recently featured an article highlighting the "David vs. Goliath" battle in which Northern Valley, Sancom, and Splitrock Properties, Inc., another South Dakota rural CLEC, are engaged as a result of their decision not to lie down and accept what the nation's largest IXCs were willing to give them (*i.e.*, nothing).[3] After recounting Sprint's claim that it is not obligated to pay for traffic terminated to a LECs' conference calling company end-user customer – a claim which has been repeatedly rejected by the Commission[4] – Dusty Johnson, chairman of the South Dakota Public Utilities Commission, set the record straight. The chairman confirmed that there is nothing unlawful about the increase in volumes of terminating access traffic – and corresponding access revenues – that result from LEC customer relationships with conference service providers. Rather, the chairman recognized that "[s]tarting a teleconferencing center is not illegal and charging a low price for that is not illegal." But these truths have not stopped the IXCs from inventing new justifications for taking access services from rural CLECs for which they have no intention of paying.

(D. S.D.); Northern Valley Communications L.L.C. v. Qwest Communications Corporation, Docket No. 1:09-cv-01004 (D. S.D.); Aventure Communications Technology LLC v. MCI Communications Services, Inc., Docket No. 5:07-cv-04095 (N.D. Iowa).

2 *Qwest Communs. Corp. v. Farmers and Merchants Mut. Tel. Co.*, File No. EB-07-MD-001, Memorandum Opinion and Order, FCC 07-175, 22 FCC Rcd. 17973 (2007) ("*Farmers and Merchants*").

3 *See* Carson Walker, *Rural Telephone Battlefield: David vs. Goliath*, Chicago Tribune, July 10, 2009, at http://www.chicagotribune.com/news/chi-ap-sd-phonefeud,0,07102212,print.story (Attached hereto as Ex. 1).

4 *AT&T Corp. v. Jefferson Tel. Co.*, 16 FCC Rcd 16130 (2001); *AT&T Corp. v. Frontier Commcn's of Mt. Pulaski, Inc.*, 17 FCC Rcd at 4041-42, ¶¶ 1, 2 (2002); *AT&T v. Beehive Tel. Co.*, 17 FCC Rcd 11641 (2002); *Qwest Commcn's Corp. v. Farmers & Merchants Mutual Tel. Co.*, 22 FCC Rcd 17973 (Oct. 2, 2007).

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The IXCs Continue To Flout Their Obligations Under Sections 201 And 203 By Their Self-Help Refusals To Pay Lawful Access Charges

The Commission should reiterate that the IXCs' resort to impermissible self-help tactics is unlawful. The regulatory structure that governs CLEC access charges was established by the Commission in its 2001 *Seventh Report and Order.* In that Order, the Commission struck a compromise. It strictly regulated CLEC access rates to ensure that they were set at reasonable levels, and they deemed those tariffed rates to be conclusively reasonable, to ensure that IXCs could not refuse payment. In establishing this system, the Commission expressly noted its concerns over the IXC's repeated use of "self-help" by simply refusing to pay tariffed access charges:

> Reacting to what they perceive as excessive rate levels, the major IXCs have begun to try to force CLECs to reduce their rates. The IXCs' primary means of exerting pressure on CLEC access rates has been to refuse payment for the CLEC access services. Thus, Sprint has unilaterally recalculated and paid CLEC invoices for tariffed access charges based on what it believes constitutes a just and reasonable rate. AT&T, on the other hand, has frequently declined altogether to pay CLEC access invoices that it views as unreasonable. We see these developments as problematic for a variety of reasons. We are concerned that the IXCs appear routinely to be flouting their obligations under the tariff system. Additionally, the IXCs' attempt to bring pressure to bear on CLECs has resulted in litigation both before the Commission and in the courts. And finally, the uncertainty of litigation has created substantial financial uncertainty for parties on both sides of the dispute.

Seventh Report and Order, 16 FCC Rcd at 9932, ¶ 23 (citations omitted).

This holding is consistent with decades of FCC precedent prohibiting self-help. The Commission's position on this matter has been stated repeatedly and unequivocally: "[T]he law is clear on the right of a carrier to collect its tariffed charges, even when those charges may be in dispute between the parties..." *Tel-Central of Jefferson City, Missouri, Inc. v. United Telephone of Missouri, Inc.*, 4 FCC Rcd 8338, 8339, ¶ 9 (1989) *(Tel-Central). See also Communique Telecommunications, Inc. DBA Logicall*, 10 FCC Rcd 10399, 10405, ¶ 36 (1995).

> The Commission previously has stated that a customer, even a competitor, is not entitled to the self-help measure of withholding payment for tariffed services duly performed but should first pay, under protest, the amount allegedly due and then seek redress if such amount was not proper under the carrier's applicable tariffed

charges and regulations.

Business WATS, Inc., v. AT&T Co., 7 FCC Rcd 7942, ¶ 2 (1989), citing *MCI Telecommunications Corporation, American Telephone and Telegraph Company and the Pacific Telephone and Telegraph Company*, 62 FCC 2d 703, ¶ 6 (1976) (*MCI Telecommunications Corp.*); *see also, National Communications Ass'n. v. AT&T Co.*, No. 93 CIV. 3707, 2001 WL 99856 (S.D.N.Y. Feb. 5, 2001) (citing both cases).

> The Bureau rejected Frontier's argument that a "dispute" as to a carrier's eligibility to receive compensation negates the IXC's obligation to pay compensation in the first instance. The Bureau stated that an IXC disputing the veracity of a LEC's certification must do so by initiating a proceeding at the Commission, e.g., through a Section 208 complaint against the LEC. We agree with the Bureau....

Bell Atlantic-Delaware v. Frontier Communications Services, Inc., 15 FCC Rcd 7475, 7479-80, ¶ 9 (2000).

The Commission has found that self-help refusals to pay access charges violate two sections of the Communications Act. Both the Commission and the courts have found that self-help constitutes a violation of § 201(b) of the Communications Act, which prohibits "unreasonable practices." *Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45, 55 (2007); *MGC Communications, Inc. v. AT&T Corp.*, 14 FCC Rcd 11647 (1999); *Tel-Central,* 4 FCC Rcd 8338 (1989).

In *MCI Telecommunications Corp.*, the Commission found that MCI's "self-help approach" violates § 203 of the Act and "existing case law." 62 F.C.C. 2d at 705-6. The Commission explained:

> Section 203(c) of the Act specifically forbids carriers from charging or collecting different compensation than specified in an effective tariff. Tariffs which are administratively valid operate to control the rights and liabilities between the parties. Rates published in such tariffs are rates imposed by law. Withdrawal from this position would invite unlawful discrimination. **** We cannot condone MCI's refusal to pay the tariffed rate for voluntarily ordered service.

62 F.C.C. 2d at 706, ¶ 6. The Commission noted that its "finding that self-help is not an acceptable remedy does not leave MCI without recourse." *Id.* It directed MCI to §§ 206 — 209 of the Act "which set forth a complaint procedure to be used by persons who believe that a carrier is violating the Act." *Id.*

But the IXCs are routinely flouting their obligation to seek any potential redress via the complaint procedure, and are instead forcing small carriers to engage in a costly game of "catch me if you can" in federal court. And while this process plays out in the courts the IXCs continue to deliver large volumes of traffic with no intention of paying the CLECs who perform the work of terminating their long-distance customers' calls. While the law is clear that the IXCs' conduct is unjustified, the IXCs' are in desperate need of reminder of their obligations under the law. The Commission should therefore address the IXCs unlawful self-help measures with all possible speed.

The Recent *Bureau Order*[5] Demonstrates That The Holding In *Farmers And Merchants* Is Settled Law

AT&T Corp. ("AT&T") recently petitioned the Wireline Competition Bureau of the Federal Communications Commission for the suspension and investigation of the access tariffs of three Iowa LECs that are subject to the Commission's rate-of-return regulations: Northwest Iowa Telephone Company, Geneseo Communications, Inc. and Union Telephone Company. Applying the defamatory moniker "traffic pumping,"[6] AT&T challenged these access tariffs on the grounds, among others, that the LECs' service to conference calling companies and chat-line providers would result in "substantially inflated [rates] and ... returns that far exceed the Commission's prescribed 11.25% rate of return." AT&T Petition at 2. AT&T did not, because it could not, allege that any of the LECs had violated any statute or Commission regulation. Rather, AT&T could resort only to the argument that that the "'safe harbor' [provisions of the Commission's existing rules do] not provide adequate protection here." *Id.* at 9.

The Bureau rejected the AT&T Petition in only seven days. As Northwest Iowa Telephone Company successfully argued, "compliance with the Commission's rules is by definition a reasonable practice."[7] Northwest Reply at 4. Thus, if AT&T (and the other IXCs in these related cases) seeks modification of the Commission's rules, such changes can "only be undertaken in a rulemaking if the existing rules are not resulting in just and reasonable rates." *Id.* at 3. A conclusion to the contrary would simply validate AT&T's improper collateral attack on binding FCC regulations. *Id.* at 5. Thus, despite AT&T's continual, inflammatory references to "traffic pumping," "revenue sharing" and "well-known traffic stimulation schemes," (AT&T

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5 Protested Tariff Transmittal, Action Taken, Report No. WCP/Pricing File No. 09-02 (July 1, 2009) (Attached hereto as Exhibit 2) ("*Bureau Order*").

6 *See* Petition of AT&T Corp. to Suspend and Investigate, WCP/Pricing File No. 09-02 (June 23, 2009) ("AT&T Petition") (Attached hereto as Exhibit 3).

7 *See* Reply of Northwest Iowa Telephone Company to Petition of AT&T Corp. to Suspend and Investigate. WCP/Pricing File No. 09-02 (June 26, 2009) ("Northwest Reply") (Attached hereto as Exhibit 4).

Petition at 2, 5), the Bureau promptly rejected AT&T's challenge, concluding that AT&T had "not presented issues regarding the [proposed tariffs] that raise significant questions of lawfulness that require investigation." *Bureau Order* at 1.

As an initial matter, it bears mention that the AT&T Petition itself demonstrates that AT&T understands that the proper means to challenge an access tariff is through a petition for suspension or rejection of a new tariff filing pursuant to 47 C.F.R. § 1.773.[8] In addition, the *Bureau Order* demonstrates that the core ruling of *Farmers and Merchants* — that LECs are entitled to terminating access when they terminate long-distance calls to conference services and chat line providers — remains unassailable precedent. This conclusion is further buttressed by a recent decision by the Enforcement Bureau of the FCC which reiterated that chat line providers are end-user customers of LECs for purposes of resolving intercarrier compensation.[9]

Thus, all of the IXCs' attempts to justify their unlawful refusal to pay tariffed terminating switched access charges have been addressed, and rejected, by the Commission in the *Farmers and Merchants Order* and have been subsequently reaffirmed by its attendant Bureaus.

The *Order on Reconsideration* in the *Farmers and Merchants* Case Changed Nothing About the Commission's Core Holding

The *Bureau Order* further demonstrates that *Farmers and Merchants* is settled, controlling precedent for the proposition that CLECs' switched access tariffs govern the traffic from IXCs delivered by LECs to customers of the LEC for calls to all LEC end users that offer conference calling and chat-line services. That precedent is not imperiled by Qwest's allegations at the Commission that Farmers neglected to produce certain documents in discovery, nor the FCC's order compelling production of that additional evidence.

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[8] Challenges to a carrier's tariff or to the Commission's rules, however, can only operate prospectively as a matter of law. *See AT&T Co. v. FCC*, 978 F.2d 727, 732 (D.C. Cir. 1992). As the Seventh Circuit explained in *Jahn v. 1-800-FLOWERS.com, Inc.*, 284 F.3d 807 (7th Cir. 2002), "[f]ederal regulations do not, indeed, cannot apply retroactively unless Congress has authorized that step explicitly. No statute authorizes the [FCC] to adopt regulations with retroactive effect. . . ." *Id.* at 810 (*citing Bowen v. Georgetown University Hospital,* 488 U.S. 204 (1988)); *see also Virgin Islands Tele. Corp. v. FCC*, 444 F.3d 666, 669 (D.C. Cir. 2006) ("A carrier charging rates under a lawful tariff, however, is immunized from refund liability, even if that tariff is found unlawful in a later complaint or rate prescription proceeding. Refunds from lawful tariffs are 'impermissible as a form of retroactive rulemaking.' Remedies against carriers charging lawful rates later found unreasonable must be prospective only." (quoting *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 410-11 (D.C. Cir. 2002)).

[9] *North County Comm. Corp. v. MetroPCS CA, LLC*, File No. EB-06-MD-007, FCC 09-719, Memorandum Opinion and Order at ¶ 3 (March 30, 2009) (Attached hereto as Exhibit 5). This case involved an intercarrier compensation dispute between a wireless carrier and a wireline LEC.

The *Memorandum Opinion and Order* in *Farmers and Merchants* thus remains settled, controlling precedent. In addition to the Bureau's reliance on that decision, three other grounds support this conclusion. First, the plain language of the *Order on Reconsideration* states that the FCC has not altered, changed, or abrogated its holding in the *Memorandum Opinion and Order*. Second, even if the FCC were considering any tariff-related issues as part of Qwest's petition for reconsideration, federal law would have required the Commission to resolve those issues more than a year ago. *See* 47 U.S.C. § 405(b). Third, federal law makes clear that Qwest must comply with and adhere to the Memorandum Opinion and Order unless and until it is expressly overturned or changes. *See* 47 C.F.R. § 1.429(k).

A plain reading of the *Order on Reconsideration* demonstrates that the Commission is keeping Qwest's procedural allegations separate and apart from the substantive legal issues it previously decided. In the *Order on Reconsideration*, the Commission observed that "Qwest ha[d] identified documents that are potentially relevant to this case, and that Farmers ought to have produced." 23 FCC Rcd. at 1619 ¶ 10. The Commission expressly stated, however, that "[w]e take no view at this time as to whether that evidence ultimately will persuade us to change our decision on the merits[.]" 23 FCC Rcd. at 1617 ¶ 6. Therefore, any contention by an IXC that a court, on the basis of the slim content of the *Order on Reconsideration*, should ignore or accord no deference to the *Memorandum Opinion and Order* is misplaced. But that is exactly one of the arguments IXCs are making across the country.

Such an argument blurs the clear distinction between the procedural and non-procedural issues that Qwest raised for reconsideration. The non-procedural issues — whether the LEC was entitled to receive the terminating access charges for which it had filed a lawful tariff — were disposed of in the *Memorandum Opinion and Order*. What remains are purely procedural issues, and they cannot be deemed to overturn or in any way affect the previous holding.

Moreover, any assertion that the Commission is reconsidering the substantive, tariff-based portion of *Farmers and Merchants* is disproved by the procedural schedule to which the Commission has adhered in that case. Throughout that proceeding, the Commission has faithfully adhered to its statutory deadlines related to addressing the non-procedural issues. Already more than 90 days have passed since Qwest filed its Supplement to Petition for Partial Reconsideration, and thus any pending reconsideration issues plainly do not relate to the Commission tariff holdings, otherwise the Commission would be in violation of a statutory deadline. 47 U.S.C. § 405(b). The Commission, however, is entitled to a presumption that it acts in good faith to satisfy its statutory obligations.[10] Here, the Commission has repeatedly

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[10] *E.g.*, *United States v. Morgan*, 313 U.S. 409, 421 (1941) ("The Commissioners are appointed by the President with the advice and consent of the Senate. We presume those elected bodies select individuals of

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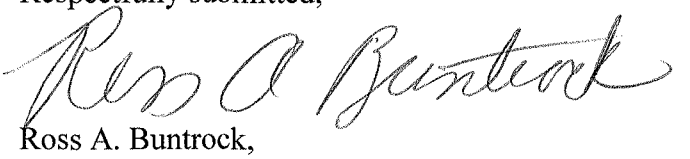
abided by Congress's statutory deadlines, demonstrating that the issues remaining in *Farmers and Merchants* are not tariff-based or substantive; that is, the question whether Farmers can enforce and collect its tariffed access charges is not pending. As such, there is no basis for presuming that any tariff-related decisions are pending reconsideration in *Farmers and Merchants*. Finally, even if aspects of the *Farmers and Merchants* decision were arguably subject to reconsideration — which they are not — the Commission's rules require compliance with final orders, regardless of whether a petition for reconsideration is pending. Commission Rule 1.429(k) states in pertinent part that:

> Without special order of the Commission, the filing of a petition for reconsideration shall not excuse any person from complying with any rule or operate in any manner to stay or postpone its enforcement. However, upon good cause shown, the Commission will stay the effective date of a rule pending a decision on a petition for reconsideration.

47 C.F.R. § 1.429(k). The *Farmers and Merchants Memorandum Opinion and Order* has not been stayed, and thus is controlling law. Hence, the Wireline Competition Bureau just relied on it July 1, 2009.

Respectfully submitted,



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cc: Chairman Julius Genachowski
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'conscience and intellectual discipline' who will perform their duties diligently.") (citing 47 U.S.C. § 154(a)); *Sprint Nextel v. FCC*, 508 F.3d. 1129, 1133 (D.C. Cir. 2007) ("There is no indication that the Commission or individual Commissioners have abused this provision or have acted in bad faith. Absent such evidence, it is appropriate to assume that their behavior is regular and proper.").